Supreme Court, U.S.
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NO. 85-1550

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM L. CALLAHAN, WARDEN, ET AL.,

CROSS-PETITIONERS,

v.

DAVID F. HAGLER,

CROSS-RESPONDENT.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

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Hankerson v. North Carolina, 432 U.S. 233 (1977) 2

Stelos v. Hosiery Motormend Corp., 295 U.S. 237 (1935) 2

United States v. Cronic, 466 U.S. 648 (1984). 4

United States v. Raines, 362 U.S. 17 (1960) 2

The Cross-Petition For Certiorari Should Be Denied Because Cross-Petitioners Prevailed On The Merits Below, And The Grounds Urged In The Cross Petition Can Be Raised In Support Of The Lower Court's Judgment If Cross-Respondent's Petition For Certiorari Is Granted.

Cross Petitioners, officials of the State of Washington ("the State" hereinafter) have petitioned this Court for review of an issue which was raised but not decided in the Court of Appeals. Hagler v. Callahan, 764 F.2d 711, 713 fn.2 (9th Cir. 1985). However, the State gained in the Court of Appeals all the relief it could gain, i.e., denial of the habeas corpus petition of Cross-Respondent David F. Hagler. Id. at 716.

In these circumstances, there is no basis for an independent grant of the State's Cross Petition For Writ Of Certiorari. If Mr. Hagler's Petition For Writ Of Certiorari (No. 85-1394) is granted, "The State as respondent may make any argument presented below that supports the judgment of the lower court,"

240 n.6 (1977) (citation omitted). This obviously includes the procedural ground not decided by the Court of Appeals but raised in the State's Cross Petition here. If Mr. Hagler's Petition is not granted, the Cross Petition should not be granted either, since the State will have been afforded all the relief to which it could be entitled. Cf. United States v. Raines, 362 U.S. 17, 27 n.7 (1960). Indeed, rather than being a serious cross petition raising an issue which could lead to greater relief for a party who prevailed below, the State's Cross Petition here seems to have been filed "out of an excess of caution" to insure that the procedural issue has been preserved for review if Mr. Hagler's Petition is granted. Stelos v. Hosiery Motormend Corp., 295 U.S. 237, 239 (1935). Although the State cannot be faulted for making sure the issue can be raised, this nevertheless provides no reason for this Court to grant the State's

Moreover, even if consideration of the State's issue were not totally dependent on whether Mr. Hagler's Petition is granted, a grant of certiorari would nevertheless be inappropriate. There is no serious "on-going conflict" between the state and federal courts on the issue raised, as the State claims. See Cross Petition at 8. To counsel's knowledge, the United States Court Of Appeals For The Ninth Circuit has never decided the issue the State raises. This Court should not, at the State's behest, create and then try to resolve such an alleged "conflict" unless and until it exists. At most, this Court should remand this case to the Court of Appeals for consideration of the State's issue in the first instance.[1]

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[1]It is quite possible that the entire case will be returned to the Ninth Circuit for consideration in light of this Court's pending decision in Rose v. Clark, No. 84-1974, argued March 24, 1986, depending, of course, upon what that decision is. The harmless error issues

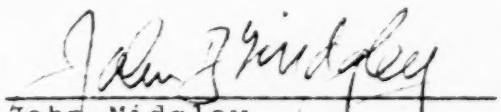
presented in Mr. Hagler's Certiorari Petition are similar or identical to the issues presented in Rose. See Petition in No. 85-1394 at 1.

See United States v. Cronic, 466 U.S. 648, 666-667 (1984). Then, if the State did not prevail in the Court of Appeals, it would be more appropriate for the State to petition this Court for review of an adequately developed issue. But in the present posture of the case a grant of Certiorari to consider the State's issue, prematurely and in isolation from the rest of the case, would be thoroughly inappropriate.

CONCLUSION

For the foregoing reasons, the Cross Petition For Writ Of Certiorari should be denied.

Respectfully submitted this 18th day of April, 1986.



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